Yap Joyce v Tee Molly & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–53 OF 1997
KAMALANATHAN RATNAM J
21 MARCH 2000

Trusts and Trustees *— Land — Transfer — Conveyance of property upon trust for infant beneficiary — Absolute transfer of property to trustee made no reference to trust deed — Whether trust deed enforceable — Whether power of trustee to charge property evinced intention not to create trust — Whether transfer of property to trustee was subject to trust even though property was registered in trustee's name*

One Lim Chui Lan ('the donor') was the registered proprietor of a piece of property. In March 1983, the donor executed a document described as a 'trust deed'. She appointed the plaintiff as the trustee and conveyed, in consideration of her natural love and affection, the second defendant, who was then at the material time an infant beneficiary, all her rights, title and interest in the property. It was also stated in the preamble that the trustee had agreed to accept such conveyance of the property upon trust for the infant beneficiary subject to the terms and conditions set forth therein. Subsequently, the donor transferred the property to the plaintiff by executing the Form 14A. The Form 14A stipulated that the consideration for the transfer of the property to the plaintiff was for 'love and affection'. There was no reference at all to the trust deed. The donor and the defendant came to know that the plaintiff had placed placards and notices outside the property advertising its sale. The donor filed the Form 19E pursuant to s 333 of the National Land Code 1965 ('the NLC') and entered a trust caveat. The plaintiff filed an application seeking for: (i) a declaration that the trust purportedly created by the trust deed was invalid and was unenforceable; (ii) a declaration that the property was in fact the property of the plaintiff as the registered and beneficial owner; and (iii) an order for the removal of the trust caveat entered by the donor.

Held:

(1) The trust deed created by the donor was an express trust providing for a life interest for the donor and upon her death the second defendant was entitled to the property. It was not necessary for the court to look for extrinsic evidence to see if there was a trust created in this case. The words contained were expressive. The plaintiff volunteered to be a trustee. It was plain that in order to give effect to the trust created, the donor transferred the property to the plaintiff by way of the Form 14A. The donor had by a transfer pursuant to From 14A conveyed the legal estate to the plaintiff to give effect to the trust created by the trust deed (see p 607E–F, H).

(2) There was nothing uncertain about the trust deed nor was there any ambiguity with regard to the intention to create a trust. The trust deed being a trust created over real property and in writing had complied with the three certainties of a trust, namely certainty of the subject matter to be held on trust, certainty of the object and certainty of the words creating the trust (see pp 607I–608A). A B

(3) Since the trust deed was effective as of 14 March 1983 and as there had been no revocation of the trust deed, the subsequent transfer of the property to the plaintiff was subject to the trust even though the property was registered in the name of the plaintiff. It was an error by the solicitors concerned in failing to endorse on the Form 14A that the transfer was pursuant to s 344 of the NLC, read with s 301 (see p 608C–D). C

(4) Pursuant to s 21 of the Trustee Act 1949, a trustee herself is empowered to raise money by charging all or any part of the trust property. Accordingly, the power given to the plaintiff as trustee to charge the property pursuant to cll 2(d) and 3(a) of the trust deed did not evince an intention not to create a trust over the property in favour of the second defendant (see p 609D–E). D E

(5) The donor had clearly evinced the intention to transfer the legal estate in the property to the plaintiff by the trust deed and that by the subsequent transfer as evidenced by the Form 14A, the donor had fulfilled her intention to vest the property in trust for the second defendant. What the donor had retained was a life interest, which could not result in the donor having failed to completely constitute the trust or that the donor had failed to divest herself of her interest in the property so as to defeat the trust (see p 610A–B). F

(6) The application by the donor was made in Form 19E together with the instrument creating the interest in question, namely the trust deed in pursuant to s 333(1)(c) of the NLC and not made pursuant to s 333(1)(b) of the NLC as argued by the plaintiff (see p 611C). G

(7) The plaintiff had expressly moved the court under s 418 of the NLC and as such it was not open to the plaintiff to ask the court to act under s 417 of the NLC after the defendants had raised the issue of three months' time limit pursuant to s 418 of the NLC. The only purpose of commencing the present proceedings was to remove the trust caveat so that the plaintiff could proceed to sell the property and the declaratory orders sought as to the validity of the trust deed were only incidental to the main order (see p 612C–E). H I

A **[Bahasa Malaysia summary**

Seorang bernama Lim Chui Lan ('donor tersebut') adalah tuan punya berdaftar sebidang tanah. Pada bulan Mac 1983, donor tersebut telah melaksanakan suatu dokumen yang dinyatakan sebagai 'suratikatan amanah'. Beliau telah melantik plaintif sebagai pemegang amanah B dan memindah hak, sebagai balasan kasih sayang, kepada defendan kedua, yang pada masa material tersebut merupakan seorang benefisiari bawah umur, semua hak, hak milik dan kepentingan di dalam hartanah tersebut. Ia juga dinyatakan di dalam mukadimah bahawa pemegang amanah telah bersetuju untuk menerima pemindahan harta tanah tersebut di atas amanah untuk benefisiari C bawah umur tertakluk kepada terma-terma dan syarat-syarat yang dinyatakan di dalamnya. Kemudian donor tersebut memindahkan hartanah tersebut kepada plaintif dengan melaksanakan Borang 14A. Borang 14A tersebut menyatakan balasan bagi pemindahan hartanah tersebut kepada plaintif adalah untuk 'kasih sayang'. Tiada rujukan D langsung kepada suratikatan amanah tersebut. Donor tersebut dan defendan mendapat tahu bahawa plaintif telah meletakkan papan tanda dan notis-notis di luar hartanah mengiklankan jualannya. Donor tersebut telah memfailkan Borang 19E menurut s 333 Kanun Tanah Negara 1965 ('KTN') dan memasukkan kaveat amanah. Plaintif telah memfailkan permohonan untuk: (i) suatu deklarasi E bahawa amanah yang dikatakan diwujudkan oleh suratikatan amanah tersebut adalah tidak sah dan tidak boleh dikuatkuasakan; (ii) suatu deklarasi bahawa hartanah tersebut adalah pada hakikatnya hartanah plaintif sebagai tuan punya berdaftar dan benefisial; dan (iii) suatu perintah mengalihkan kaveat amanah yang dimasukkan oleh donor tersebut.

F

Diputuskan:

(1) Suratikatan amanah yang diwujudkan oleh donor adalah suatu amanah nyata yang memperuntukkan kepentingan seumur hidup untuk donor tersebut dan di atas kematiannya defendan kedua G adalah berhak kepada hartanah tersebut. Adalah tidak perlu bagi mahkamah untuk melihat kepada keterangan luaran untuk melihat sama ada amanah diwujudkan di dalam kes ini. Perkataan-perkataan yang terkandung adalah jelas. Plaintif telah dengan sukarela menjadi seorang pemegang amanah. Adalah jelas bahawa untuk memberikan kesan kepada amanah yang H diwujudkan, donor tersebut telah memindahkan hartanah kepada plaintif melalui Borang 14A. Donor tersebut telah melalui pindah milik menurut Borang 14A memindahhak estet sah kepada plaintif untuk memberikan kesan kepada amanah yang diwujudkan oleh suratikatan amanah (lihat ms 607E–F, H).

I (2) Tiada apa-apa yang tidak tentu berkenaan dengan suratikatan amanah tersebut atau pun terdapat ketaksaan berkenaan dengan niat untuk mewujudkan suatu amanah. Suratikatan amanah

tersebut merupakan suatu amanah yang diwujudkan ke atas hartanah dan secara bertulis telah mematuhi tiga ketentuan suatu amanah, iaitu ketentuan subjek perkara yang dipegang di atas amanah, ketentuan objek dan ketentuan perrkataan-perkataan yang mewujudkan amanah (lihat ms 607I–608A). A

(3) Oleh kerana suratikatan amanah adalah efektif sejak 14 Mac 1983 dan oleh kerana tiada pembatalan suratikatan amanah tersebut, pemindahan terkemudian hartanah tersebut kepada plaintif adalah tertakluk kepada amanah walaupun hartanah tersebut didaftarkan di atas nama plaintif. Adalah kesilapan peguamcara berkenaan kerana gagal untuk mengendors di atas Borang 14A bahawa pemindahan adalah menurut s 344 KTN, dibaca bersama s 301 (lihat ms 608C–D). B C

(4) Menurut s 21 Akta Pemegang Amanah 1949, seorang pemegang amanah itu sendiri diberi kuasa untuk memperolehi sumber kewangan dengan menggadaikan semua atau apa-apa bahagian hartanah amanah tersebut. Dengan itu, kuasa yang diberi kepada plaintif sebagai pemegang amanah untuk menggadaikan hartanah tersebut menurut fasal 2(d) dan 3(a) suratikatan amanah tersebut tidak menunjukkan niat untuk tidak mewujudkan suatu amanah ke atas hartanah yang berpihak kepada defendan kedua (lihat ms 609D–E). D

(5) Donor tersebut tersebut telah menunjukkan niat untuk memindahkan estet sah di dalam hartanah tersebut kepada plaintif melalui suratikatan amanah tersebut dan melalui pemindahan hak yang terkemudian seperti yang dibuktikan oleh Borang 14A, donor tersebut telah menunaikan niatnya untuk meletakhak hartanah tersebut secara amanah kepada defendan kedua. Apa yang dipegang oleh donor tersebut adalah kepentingan seumur hidup, yang tidak dapat mengakibatkan donor tersebut gagal sepenuhnya untuk mewujudkan amanah tersebut atau pemegang amanah telah gagal untuk meletak hak kepada dirinya sendiri akan kepentingan di dalam hartanah tersebut untuk menggagalkan amanah tersebut (lihat ms 610A–B). E F G

(6) Permohonan donor tersebut telah dibuat di dalam Borang 19E bersama-sama dengan instrumen mewujudkan kepentingan yang dipersoalkan, iaitu suratikatan amanah menurut s 333(1)(c) KTN dan bukan menurut s 333(1)(b) KTN seperti yang dihujahkan oleh plaintif (lihat ms 611C). H

(7) Plaintif secara nyata telah memohon kepada mahkamah di bawah s 418 KTN dan dengan itu adalah tidak terbuka kepada plaintif untuk meminta mahkamah untuk bertindak di bawah s 417 KTN selepas defendan-defendan membangkitkan isu tempoh had masa tiga bulan menurut s 418 KTN. Tujuan tunggal memulakan prosiding-prosiding ini adalah untuk mengalihkan kaveat amanah agar plaintif boleh mula menjual hartanah tersebut dan perintah- I

perintah deklarasi yang dipohon berkenaan dengan kesahan suratikatan amanah hanyalah berkaitan dengan perintah utama tersebut (lihat ms 612C–E).]

Notes

For cases on trusts involving land, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1392–1408.

Cases referred to

Joseph De Cruz James & Anor, Re; Margaret Rose v Manomani Kandiah [1973] 2 MLJ 117 (refd)

Kayford Ltd, Re [1975] 1 All ER 604 (refd)

Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234 (refd)

Parmeshiri Devi & Anor v Pure Life Society [1971] 1 MLJ 142 (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)

Warriner v Rogers LR 16 Eq 340 (refd)

Legislation referred to

National Land Code 1965 ss 89, 301(d), 304, 333(1), (b), (c), 340(4), 344(1), 417(1), 418, Form 14A

Trustee Act 1949 s 21

Mahathir Abdullah (*Anita Shoba Magimay* with him) (*Shahrum Shah Chin & Mahathir*) for the plaintiff.

Rajaswary Kumarasamy (*David Chong & Co*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

One Lim Chui Lan ('the donor') was the registered proprietor of property previously held under Geran No 12350, Lot No 118, Seksyen 92, Daerah Kuala Lumpur and now held under Geran 8347, Lot No 335, Seksyen 92, Bandar Kuala Lumpur, Daerah Wilayah Persekutuan, together with a three-storey shophouse erected thereon bearing the postal address of No 142, Jalan Sungei Besi, Kuala Lumpur, hereinafter collectively referred to as the said property.

On 14 March 1983, the donor executed a document described as a 'trust deed'. She appointed her daughter, the plaintiff herein, as the trustee and conveyed, in the preamble to the trust deed, her desire, in consideration of her natural love and affection, to grant to her grandson, the second defendant herein, who was then at the material time an infant beneficiary, all her rights, title and interest in and to the said property. It was also stated

in the preamble that the trustee had agreed to accept such conveyance of the said property upon trust for the infant beneficiary subject to the terms and conditions set forth therein. It is necessary for a proper consideration of the issues raised, to set out the exact terms and conditions, which read as follows:

1 That in consideration of natural love and affection for the Infant Beneficiary and subject always to the provisions of cl 2 hereof the donor hereby conveys all her rights title and interest in and to the said property unto the trustee and the trustee hereby agrees, confirms and declares that she shall hold the said property upon trust for the Infant Beneficiary absolutely.

2 Notwithstanding the trust hereby created the donor hereby, expressly reserves upon herself the absolute right at all times throughout her lifetime to all or any of the following acts:

(a) to occupy the whole or any part of the said property;

(b) to lease or otherwise let out the said property or any part thereof to any person, firm or corporation and to receive all rentals derived from such leasing or letting out of the said property for herself absolutely;

(c) to grant to any person or persons the right to occupy or otherwise reside in the said property or any part thereof free of rental;

(d) to charge or otherwise encumber the said property in favour of any bank, financial institution or person as security for loans, credit facilities or other accommodation granted by such bank, financial institution or person to the donor or any third party.

3 The trustee hereby agrees and covenants with the donor as follows:

(a) that the trustee shall at all times throughout the lifetime of the donor and for the purposes of giving effect to any of the rights reserved unto the trustee under cl 2 hereof to deal with the said property in accordance with the directions of the donor; and

(b) as soon as practicable after the demise of the donor or the Infant Beneficiary attaining the age of majority, whichever of such events is the later the trustee shall do all such acts and execute all such documents as may be necessary for the said property to be transferred and registered into the name of the Infant Beneficiary.

4 The donor hereby covenants and undertakes with the trustee as follows:

(a) that the donor shall bear all such taxes, costs and expenses whatsoever which may be imposed upon or payable or otherwise incurred or expended by the trustee in the discharge and performance of the duties of the trusttrustee hereunder;

(b) to save harmless and indemnify and keep the trustee indemnified against any claims, demands, actions, proceedings, prosecution, fines, penalties, loss or damages which may be instituted against or otherwise incurred or referred by the trustee arising out of the discharge and performance of the duties of the trustee hereunder or in respect of the said property.

5 This trust deed shall be binding upon the respective heirs, personal representatives and estates of the donor and the trustee.

A Subsequently the donor transferred the said property to the plaintiff on 10 November 1983 by executing the Form 14A on 15 September 1983. The said Form 14A stipulated that the consideration for the transfer of the said property to the plaintiff was for 'love and affection'. There was no reference at all to the trust deed. It is not in dispute that the plaintiff has borne all the quit rent and assessment payments due in respect of the said
B property from the time the said property was transferred to the plaintiff until to date.

The donor and the second defendant came to know that the plaintiff had placed placards and notices outside the said property advertising its sale. They instructed their solicitors who wrote a letter on 23 May 1995
C drawing the plaintiff's attention to the existence of the trust deed and informing her that any dealings in respect of the said property must be pursuant to the terms and conditions contained therein. The plaintiff replied through her solicitors' letter dated 22 June 1995. It is imperative to reproduce the main contents of the said letter which reads:

D We are instructed to state as follows:

(1) that our client could not recall ever signing any 'trust deed' and the terms of the 'trust deed' were never revealed nor explained to her by the Solicitor in charge at the material time.

(2) that at all material times, both your client, Madam Lim Chui Lan and
E your Solicitor represented to and assured our client that the above property was transferred by Madam Lim Chui Lan to her absolutely for love and affection. This is fully evidenced by the contents of the relevant Form 14A duly executed by your client that the consideration for the transfer was expressly stated as 'kasih sayang'. Our client's name was also registered at the relevant land office as the absolute owner thereof and not 'as trustee' and without any supporting 'trust deed'. Further our client
F was at the material time given a copy of the said Form 14A and the original title deed but was never informed nor given a copy of the 'trust deed'.

In the meantime, on 25 May 1995 the donor filed the Form 19E pursuant to s 333 of the National Land Code 1965 ('the NLC') and entered a trust
G caveat. She had in the said Form 19E expressly referred to the trust deed dated 14 March 1983. She also made a statutory declaration on 25 May 1983 in support of the trust caveat in which she again reverted to the existence of the trust deed and that the plaintiff was the trustee in respect of the said property. The donor died on 12 July 1997 and by an order dated 5 June 1999 one Tee Molly was appointed to represent the estate of the
H donor in respect of these proceedings. Further by another order dated 7 May 1998 the second defendant was ordered to be made a co-defendant.

The plaintiff's application

I The plaintiff's application is substantially for:

(a) a declaration that the trust purportedly created by the trust deed is invalid and is unenforceable;

(b) a declaration that the said property is in fact the property of the plaintiff as the registered and beneficial owner thereof; and

(c) an order for the removal of the trust caveat entered by the donor.

The defendants' counterclaim

The defendants' counterclaim for the following prayers:

(1) A declaration that the said property transferred by the said Lim Chui Lan deceased to the plaintiff by transfer dated 14 March 1983 was in pursuance of the trust deed dated 14 March 1983 and continues to be subject to the trusts contained in the said trust deed dated 14 March 1983.

(2) A declaration that the plaintiff holds the said property as trustee for David Yap Chee Keong, the second defendant, and upon the trust created by the said trust deed dated 14 March 1983.

(3) The plaintiff do forthwith execute the transfer in Form 14A and all necessary documents to transfer the said property to David Yap Chee Keong pursuant to the said trust deed dated 14 March 1998 and in default of the plaintiff doing so the Senior Assistant Registrar of the High Court do execute the Form 14A and all other documents necessary to effect the transfer of the said property in the name and on behalf of the plaintiff.

(4) The plaintiff forthwith deliver to the first defendant or her solicitors the original issue document of title to the aforesaid property and all other necessary documents in relation thereto as may be required by the Land Office to have the transfer of the aforesaid property registered in the name of David Yap Chee Keong.

(5) The plaintiff deliver to the first defendant a complete statement of accounts of all sums due and payable by the defendants pursuant to cl 4 of the said trust deed dated 14 March 1983 and upon payment by the first defendant of the said sums, the plaintiff do forthwith deliver to the second defendant all the assessment and quit rent receipts relating thereto.

(6) Costs.

Findings of the court

Lack of intention to create, or uncertainty of the trust deed

It is the plaintiff's case that it was not the intention of the donor to create a trust or alternatively that such an intention is uncertain. This is because the said property had been transferred to the plaintiff absolutely, the consideration being 'love and affection' as stipulated in Form 14A. The plaintiff relied on *Re Kayford Ltd* [1975] 1 All ER 604 to determine the intention of the donor when creating a trust. I cannot, even by stretching the meaning given to the interpretation of what constitutes a trust account as expounded by Megarry J (as he then was), hold that the decision in

A *Re Kayford Ltd* supports the plaintiff's case. In *Re Kayford Ltd* the company carried on a mail-order business. It was receiving many orders. Some orders were for full payment and some as deposits. The company was going into liquidation. To protect the interest of the innocent purchasers the company sought the help of its accountants who suggested that all such monies received be placed into a 'Customers Trust Deposit Account'. The
B accountants' advice directed to the bank by the company as instructions, was not carried out by the bank. The day after the company went into liquidation, the company's written instructions were received by the bank. The question arose as to whether the sums of money paid into the bank account were held on trust for those who had sent them or whether they
C formed part of the general assets of the company. In holding that there was trust, Megarry J said at p 607:

> ... I feel no doubt that the intention was that there should be a trust. There are no formal difficulties. The property concerned is pure personalty, and so writing, though desirable, is not an essential. There is no doubt about the so-called 'three certainties' of a trust. The subject-matter to be held on trust is
D clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

E The case before me is not one of personalty. It concerns real estate. To my mind, the trust deed created by the donor in this case is an express trust providing for a life interest for the donor and upon her death the second defendant, her grandson, is entitled to the said property. I do not have to look for extrinsic evidence to see if there is a trust created in this case. The words contained are expressive. The plaintiff volunteered to be a trustee. It
F is plain to me upon reading the trust deed that in order to give effect to the trust created, the donor transferred the said property to the plaintiff by way of the Form 14A. The argument of the plaintiff that by retaining for herself the right to charge the said property pursuant to cl 2(d) of the trust deed the donor had created a situation that the said property could not be transmitted to the second defendant in accordance with the terms of cl 3(b),
G is unacceptable. This is because, pursuant to the trust deed, namely the entire cl 2, the donor had provided for a life interest for herself and the trust deed had, pursuant to cl 2 thereof, detailed this interest which, inter alia, included a right to charge the said property as security for a lease which the plaintiff as trustee had agreed and covenanted to do, pursuant to cl 3(a). It
H is my judgment that although the title shows the plaintiff as the registered owner of the said property she holds the same subject to the trust. It follows therefore as my judgment that the donor had by a transfer pursuant to Form 14A, conveyed the legal estate to the plaintiff to give effect to the trust created by the trust deed and which continues to date.

I To my mind there is nothing uncertain about the trust deed nor is there any ambiguity with regard to the intention to create a trust. The said trust deed being a trust created over real property and in writing, has complied

with the three certainties of a trust, namely, certainty of the subject matter to be held on trust, certainty of the object and certainty of the words creating the trust. Whilst by her solicitors' letter dated 22 June 1995 the plaintiff 'could not even recall signing the trust deed', had alleged that the terms of the trust deed were never explained to her by the solicitors concerned (and this being a very serious allegation) had alleged that the donor and her solicitors had misrepresented to her that the transfer was directly to her for love and affection (again another serious allegation against a solicitor) and yet with all these serious allegations alluded to, the plaintiff never made any attempt to promptly declare the trust deed as invalid. This application was only filed on 28 January 1997.

What is of significance is that from a denial of any knowledge of having signed the trust deed, the plaintiff has now admitted to having signed it. I am persuaded to arrive at the conclusion that since the trust deed was effective as of 14 March 1983 and as there has been no revocation of the said trust deedtrust deed to date, the subsequent transfer of the said property to the plaintiff is subject to the trust even though the said property is registered in the name of the plaintiff. In my judgment, it is an error by the solicitors concerned in failing to endorse on the Form 14A that the transfer was pursuant to s 344 of the NLC, read with s 301. The said s 344(1) reads as follows:

> (1) Where, by any instrument of dealing or order of the Court or Land Administrator, any alienated land or share or interest therein is transferred or transmitted to, vested in, or created in favour of any person or body 'as trustee', or two or more persons or bodies ' as trustees', the Registrar shall so describe him, it or them in the memorial of registration.

The said s 301 reads as follows:

> An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) that it does not declare or, except as permitted by s 344, disclose the existence of any trust; and
>
> (e) ...

In any case, in *Re Joseph De Cruz James & Anor; Margaret Rose v Manomani Kandiah* [1973] 2 MLJ 117 the court held that, the entry under the column 'consideration' in Form 14A, as gift to daughter in accordance with the deed of trust dated 26 June 1970, and by transferring the property to a person 'as trustee', the deceased had merely complied with s 301(d) of the NLC read together with s 304. The court went on to hold that the entry in the memorandum of transfer was effected essentially for the purpose of showing that the gift to the child was the consideration for the transfer and that the entry could not be construed to be a declaration of trust or an intention to declare a trust.

A As I said earlier, the trust deed speaks for itself. By cl 1, the donor had, subject to cl 2, conveyed all her rights, title and interest in the said property to the plaintiff and the plaintiff as trustee had agreed, confirmed and declared her intention to hold the said property upon trust for the second defendant. By cl 3(a) of the said trust deed the plaintiff as trustee had agreed and covenanted that throughout the lifetime of the donor and for the B purpose of giving effect to cl 2, to deal with the said property in accordance with the directions of the donor. There is no evidence before me that the donor had directed the plaintiff to exercise any of the rights set out in cl 2 of the trust deed, during her lifetime. On the contrary, during her lifetime, she had expressed her dismay at the conduct of the plaintiff when she had C attempted to sell the said property in breach of the trust deed. She even entered a trust caveat and affirmed a statutory declaration confirming the contents of the trust deed. All these facts cannot be ignored. The death of the donor cannot be regarded as an avenue for the plaintiff to disregard the donor's intentions with impunity. The trust deed speaks upon her death. To my hearing, her voice is loud and clear. Her intentions speak for themselves. D The argument of the plaintiff, that by allowing the property to be charged, the donor has shown that there is a possibility of rendering the transfer of the said property to the second defendant impossible, or to defeat the trust, is meaningless because pursuant to s 21 of the Trustee Act 1949, a trustee herself is empowered to raise money by charging all, or any part of the trust property. Accordingly, the power given to the plaintiff as trustee to charge E the said property pursuant to cll 2(d) and 3(a) of the said trust deed does not evince an intention not to create a trust over the said property in favour of the second defendant as alleged by the plaintiff.

Incomplete trust

F It was the argument of the plaintiff that the cumulative effect of cll 1 and 2 of the trust deed is that the trust as it exists is incompletely constituted and is therefore invalid and not binding upon the plaintiff. The plaintiff argued, relying on *Parmeshiri Devi & Anor v Pure Life Society* [1971] 1 MLJ 142 that the donor had failed to do all that she had to do to divest herself of the legal G and equitable estates in the property. In the *Pure Life Society* the court found, on an interpretation of the document described as a lease, that the same did not create the trust but was instead an agreement or contract under which the parties had agreed to bind themselves. Abdul Hamid J (as he then was) cited with approval the dictum of Vice-Chancellor Bacon in the case of *Warriner v Rogers* LR 16 Eq 340 at p 384:

H

> The rule of law upon this subject I take it to be very clear, and with the exception of two cases which have been referred to (*Richardson v Richardson* and *Morgan v Malleson*), the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he I may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest.

I agree with this decision and find on the facts of the case before me that the donor had clearly evinced the intention to transfer the legal estate in the said property to the plaintiff by the trust deed and that by the subsequent transfer as evidenced by the Form 14A, the donor had fulfilled her intention to vest the property in trust for the second defendant. What the donor had retained was a life interest, also to be executed through the trustee. The facts of the present case are not the same as in the *Pure Life Society*. By retaining a life interest for herself, which included a right to charge the said property, which the plaintiff as trustee had, pursuant to cl 3(a) agreed to do, cannot result in the donor having failed to completely constitute the trust or that the donor had failed to divest herself of her interest in the property so as to defeat the trust.

The plaintiff also argued that the donor had failed to vest the legal estate in the plaintiff as a trustee and that therefore the trust is incompletely constituted in that there has been a failure to comply with ss 344 and 301 of the NLC. It was the plaintiff's case that based upon the torrens system of land registration, it is insufficient for the donor to transfer the said property to the plaintiff and that the said property had to be transferred to the plaintiff as trustee, to enable the fact of the trusteeship to be endorsed in the memorial of registration as provided for under s 344. The plaintiff argued that in the absence of any endorsement of trusteeship under s 344, the provisions of s 89 of the NLC would apply in that the document of title which shows the plaintiff to be the registered proprietor of the said property without being subject to any conditions or restrictions in interest, is conclusive evidence of that fact. The fallacy of the plaintiff's argument is seen if one looks at s 89 of the NLC, which is expressly stated to be subject *to the provisions of this Act* (emphasis added) that is, the NLC and the provisions of the NLC that deal with conclusiveness of title when read together with s 340(4) which reads:

> (4) Nothing in this section shall prejudice or prevent —
>
> (a) ...
>
> (b) the determination of any title or interest by operation of law.

In any case in *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 Lord Diplock said at p 45 as follows:

> The restriction under the Torrens system on the kinds of interests in land which are capable of being registered does not prevent the creation of other kinds of interests in land or dealing with them. In particular it does not prevent or restrict the creation of beneficial interests in land whether under express trusts or under constructive or resulting trusts arising by operation of Malaysian law ... .

The trust caveat

The plaintiff contended that the donor had applied an incorrect procedure to enter the trust caveat. It was the plaintiff's case that pursuant to s 333(1) of the NLC since the application was made pursuant to s 333(1)(b) the instrument transferring the said property, namely, the Form 14A ought to

have been prescribed together with the trust caveat and not the trust deed. To consider this argument it is necessary to reproduce s 333(1) of the NLC which reads as follows:

> (1) The Registrar may enter a Trust Caveat on the application of —
>
> (a) the trustees for the time being of any land or interest; or
>
> (b) the person or body by whom any land or interest is first transferred to Trustees; or
>
> (c) the person or body by whom any interest is created in favour of Trustees:
>
> Provided that no application made by virtue of paragraph (b) or (c) shall be entertained unless it is presented to the Registrar with the instrument transferring or creating the land or interest in question.

In my judgment the application by the donor was made in Form 19E together with the instrument creating the interest in question, namely, the trust deed pursuant to s 333(1)(c) of the NLC and not made pursuant to s 333(1)(b) of the NLC as argued by the plaintiff.

Is the plaintiff out of time in applying to remove the trust caveat?

The defendants argue that since the application to remove the caveat was not made within the period of three months beginning with the date on which the entry of the caveat was communicated to the plaintiff, that is, by 12 May 1996 when the plaintiff's solicitors informed the defendants of the existence of the caveat, the application to remove the caveat made pursuant to s 418 of the NLC should not be entertained by this court. Section 418 of the NLC reads as follows:

> Appeals to the Court
>
> (1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.
>
> (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.
>
> (3) In this section 'decision' includes any act, omission, refusal, direction or order.

It is the plaintiff's case that the registrar's decision to entertain the donor's application to enter the trust caveat was never communicated to the plaintiff since the plaintiff made the discovery of the existence of the caveat by herself. In any event the plaintiff pleads that since she has prayed for further relief and/or directions of this court, it is therefore open to this court to direct the removal of the trust caveat under s 417(1) of the NLC which reads as follows:

> General authority of the Court
>
> (1) The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to

> any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith.

Since under s 417 of the NLC there is no limitation within which an application for the necessary order can be made, the plaintiff argued that it is therefore open to this court to make the necessary order sought for the removal of the caveat.

It is my judgment that the entry of the trust caveat is an administrative act of the registrar and there is no provision in the NLC requiring the registrar to communicate his decision to entertain the donor's application to enter the trust caveat, to the plaintiff. There is no doubt in my mind that the three-month period must commence from the time the plaintiff knew of the existence of the trust caveat which, at the very least was on 12 May 1996.

The plaintiff has, in the title to these proceedings, expressly moved this court under s 418 of the NLC and as such it is not now open to the plaintiff to ask this court to act under s 417 of the NLC after the defendants have raised the issue of the three months' time limit pursuant to s 418 of the NLC. It is obvious that the present proceedings have been commenced by the plaintiff solely to have the trust caveat removed from the register. The plaintiff was reminded by the donor's solicitors by way of their letter dated 25 May 1995 of the existence of the trust deed, but the plaintiff did not file any proceedings to have the trust deed declared void then, but only did so after she became aware of the trust caveat. It is my finding therefore that the only purpose of commencing the present proceedings is to remove the trust caveat so that the plaintiff can proceed to sell the said property and that the declaratory orders sought as to the validity of the trust deed are only incidental to the main order, which is to have the trust caveat removed. In *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234, Raja Azlan Shah Ag LP (as his Highness then was) said, with regard to s 418 of the NLC at p 237 as follows:

> ... Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time-limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.

Having considered the entire submissions of both counsel and having read all the authorities submitted, I am firmly of the view that the plaintiff's claim must be dismissed with costs. It is unfortunate that counsel for the plaintiff has failed to submit:

(a) whether the defendants are entitled to make a counterclaim on the affidavit; and

A (b) whether the defendants are entitled to the prayers sought by way of the counterclaim.

I therefore take it that counsel for the plaintiff has conceded that it is appropriate for the defendants to make a counterclaim through their affidavit in reply rather than filing a separate application. As for the B counterclaim, since I have rejected the plaintiff's version and since the plaintiff herself has not submitted in respect of the prayers sought in the counterclaim, I grant an order in terms of all the prayers sought in the counterclaim.

Order accordingly.

C

Reported by Jafisah Jaafar

D

E

F

G

H

I